SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-
CASTERS, INC. and JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP.,
Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (App. A. pp. 21-30)[1] is unreported. The memorandum opinion and order of the Federal Communications Commission (App. C. pp. 33-65) is reported at 4 F.C.C.2d 612.

[1] References in this brief to the Appendixes in the Government's petition for writ of certiorari will be identified as "App. A. pp. ".

JURISDICTION

The judgment of the court of appeals (App. B, pp. 31-32) was entered on April 28, 1967. By order of this Court, a petition for certiorari had to be filed on or before July 13, 1967, if the mandate of the court of appeals was to be stayed. The petition for certiorari by Midwest was filed on July 27, 1967. By order of this Court, Respondent's oppositions to both petitions were to be filed on or before August 26, 1967. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §§ 1254(1) and 2350.

QUESTION PRESENTED

Respondents believe that the sole question presented is essentially a very narrow one, namely: Does the Federal Communications Commission have the power to issue a temporary stay to maintain the *status quo* pending a hearing to determine if a permanent stay should be issued or other relief granted, except as specifically authorized by Congress?

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 204, 301, 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) and 312(c) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(a), 153(e), 154(i), 204, 301, 303(f), 303(h), 303(r), 303(s), 307(b), 312(b) and 312(c) all of which are set forth in Appendix E of the Government's petition except for Sections 204 and 312(c) which appear as Appendix A of this Brief.

STATEMENT

Respondents adopt the Statement by Petitioners, United States of American and Federal Communications Commission, except for the last paragraph on page 10 of their petition. In lieu thereof, Respondents submit the following paragraph:

Respondents petitioned the court of appeals for review of the interim restrictions, contending that temporary relief of this kind is not authorized by the Communications Act.[2] The court of appeals set aside the Commission's order insofar as it granted interim relief, expressly stating that it was not deciding any of the other questions presented (App. A, p. 29). Specifically, the court below concluded and held that Sections 4(i) and 303(r) of the Communications Act [47 U.S.C. 154(i) and 303(r)],[3] the only sources of authority relied on by the Commission, do not empower the Commission to temporarily restrain or limit Respondents' delivery of Los Angeles television signals to their customers in the San Diego area.

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[2]In addition, Respondents, Trans-Video, Mission and Pacific urged, *inter alia*, that the Commission lacked jurisdiction to regulate CATV systems; that its regulations violated the First Amendment; and that the rule invoked by the Commission was invalid because it was adopted without adequate notice.

[3]In the paragraphs that follow, references to Sections of the Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other Sections are identically numbered in both the Act and the Code.

ARGUMENT

In effect, the United States Court of Appeals for the Ninth Circuit has concluded that the Federal Communications Commission may not issue a temporary stay in the nature of a restraining order because Congress has not given the Commission the required statutory authority to do so. In so holding, the court found that such authority did not flow from either Section 4(i) or Section 303(r) of the Communications Act of 1934, as amended, the only sources of authority upon which the Commission relied.

To be more precise, the extent of the holding of the court of appeals is that the Federal Communications Commission not only lacks the authority to issue a temporary stay in connection with a non-licensed activity such as CATV, but it also lacks the authority to temporarily stay the activities of one of its licensees. The court below explained its position in this regard by referring to the authority of the Commission to issue cease and desist orders which, it pointed out, Congress intended to limit to the scope of the Commission's licensing authority. The court then correctly rationalized that Sections 4(i) and 303(r) of the Act do not empower the Commission to issue stays against licensees since, if they did, Congress would have been duplicating an already existing power when, in 1952, it gave the Commission the power to issue cease and desist orders. It follows, of course, that, if Sections 4(i) and 303(r) do not empower the Commission to stay activities of licensees, they do not empower it to temporarily stay the activities of non-licensees such as CATV systems. The decision, which Petitioners now urge this Court to review, holds nothing more and, in so holding, it is unquestionably correct.[4]

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[4]The opposition of Respondent, Southwestern, demonstrates in greater detail the validity of the decision below. Respondents, Mission, Pacific Video and Trans-Video, adopt and support this argument.

Petitioners, however, would have it appear that the decision below is one of far reaching significance, namely, that it determines the Commission's lack of authority insofar as any regulation of CATV systems is concerned. Obviously, the decision of the court below did nothing of the kind. It merely correctly held that the Federal Communications Commission has no statutory authority to temporarily stay or restrain Respondents' CATV activities pending a hearing looking toward a decision with respect to those activities.

Whether, and to what extent, the Federal Communications Commission may regulate CATV systems and their activities is a question the answer to which depends on many more factors and considerations than were considered by the court below, and it is more than apparent that the decision below does not reach that question. In support of its authority to temporarily stay Respondents' lawful activities, the Commission relied solely on Sections 4(i) and 303(r) of the Communications Act, and indeed there are no other provisions of the Act on which it could rely. On the other hand, in support of its authority to regulate CATV systems, the Commission relies primarily on Section 307(b) of the Act and, in addition, contends that the rules it has adopted are proper implementations of Sections 1, 2 and 303(h) and (s) of the Act. The Commission's *Second Report and Order*, 2 F.C.C.2d 725, 788, also refers to Sections 308 and 309 of the Act. Frankly, it borders on the ridiculous to say that the decision below, holding only that Sections 4(i) and 303 (r) of the Communications Act do not empower the Commission to issue temporary restraining orders, also determines the extent of the Commission's authority, if any, with respect to CATV systems.

In addition, the impact of the decision is, for all practical purposes, limited to the San Diego area and is of no significance insofar as the spread of CATV systems is concerned.[5]

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[5] Even in the San Diego area the Ninth Circuit decision will have little, if any, impact on the further development of either UHF or VHF television. The concern there is that the availability of Los Angeles television signals and programs to San Diego residents will

Respondents emphasize again that the decision below holds only that the Federal Communications Commission is not empowered to issue temporary restraining orders, and even the Commission recognizes that the only use it would make of such power—if it had it— would be to maintain the *status quo* pending consideration and disposition of a request by an interested party, i.e., a television broadcast station, for relief above and beyond that provided by established rules and regulations of the Commission. To date, to Respondents' knowledge, there have been only three other stays granted, i.e., Buffalo, New York, (7 Pike and Fischer, R.R.2d 370), the Lexington, Kentucky, area (8 Pike and Fischer, R.R.2d 1092) and the Great Bend, Kansas, area (9 Pike and Fischer, R.R.2d 482). Insofar as Respondents can determine, almost all of the Commission proceedings against CATV systems throughout the country involve violations of the Commission's Rules and Regulations. Such proceedings are being successfully prosecuted under the provisions of Sections 312(b) and (c) of the Communications Act. Furthermore, Respondents believe that there are very few, if any, potential situations with respect to which temporary stays will be requested or needed to maintain a *status quo*.

Despite the obvious limited need of the Commission for the power to issue temporary restraining orders, Petitioners contend that the Ninth Circuit decision presents a question of "far-reaching legal and practical importance" or is of

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so affect the ability of San Diego stations to earn revenue that they cannot provide a desired standard of local public service programming and that those residents who cannot afford CATV connections might perhaps be left with an inferior program service. This is an old problem in San Diego because many residents of the area have received, and continue to receive, the signals of Los Angeles stations by installing tall, costly, and unsightly, albeit effective, rooftop antennae. It is a fact of life, surely recognizable by this Court, that if the residents of the San Diego area can obtain the type and quality of program service they desire from the local San Diego stations (VHF or UHF), they will neither install expensive outdoor antennae nor pay for CATV connections.

"paramount importance" since, among their other allegations, it ". . . unduly restricts the Commission's ability to carry out its congressionally prescribed function under the Communications Act." Or as Petitioner, Midwest, puts it, the result would be calamitous if the Commission could not maintain the "status quo" pending a hearing.

It is respectfully submitted that such predictions are overdrawn, without basis in fact or law, and are simply the result of the Commission's desire to be free from the equitable and legal restrictions and burdens that should limit the power of an administrative agency in seeking to enjoin the lawful activities of American citizens. The Commission, in its original opinion, conceded that it could have sought injunctive relief in the court of appeals, but the Government attempts, in its petition, to cover up the availability of this remedy by referring to it only in a footnote on the next to last page of its petition. Petitioner, Midwest, ignores the existence of this remedy altogether.

The proper course for the Commission to follow has recently been charted by this Court in *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 16 L. Ed. 2d, 802 (1966). In that case, it was held that the Federal Trade Commission could proceed under the All Writs Act, 28 U.S.C. § 1651(a), and secure an injunction in the court of appeals to maintain the *status quo* pending a final determination on the merits, irrespective of the fact that the FTC, itself, could not issue a stay, nor was specifically authorized by Congress to proceed under the All Writs Act.

The Federal Communications Commission, while conceding that this relief was available to it, sought to justify its decision not to use this remedy by stating that ". . . initial consideration of the matter by the Commission, followed by judicial review . . ." was ". . . preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission." 4 F.C.C.2d 612, 622-623. (See App. C, pp. 53-54). It is submitted that this reason is nothing more than a conclusion unsupported by

fact, and, upon closer analysis, obviously proves nothing. In fact, a contrary principle should apply, namely, that the agency making the decision on the merits should not prejudge the case by determining whether a temporary stay is required in advance of a decision on the merits. Otherwise, the agency ends up as a tribunal committed to a decision already made and the hearing on the merits becomes a useless gesture. However, the real reason that the Commission desires the authority to issue temporary stays is crystal clear—it seeks to avoid the burden of proving, in the first instance, that a temporary stay is in the public interest. The Commission, in all of its appellate oppositions to requests for a stay of its orders, makes contentions similar to those made by Midwest before the court below:

> "A party seeking a stay of an administrative agency's decision pending appeal bears a heavy burden. To obtain such a stay the Courts of Appeals require a showing that: (1) there is a *strong* likelihood of petitioner's success on the merits; (2) petitioners will suffer irreparable injury if a stay is not granted; (3) a stay will not produce substantial harm to others interested in the proceeding; and (4) the public interest favors a stay." (*Opposition to Application for Interlocutory Injunction and To Petition for Stay Pendente Lite*, p. 12, No. 21183, filed August 18, 1966)

Thus, when the Commission issues a temporary stay to maintain the *status quo*, it is the judge of the sufficiency of the showing of what the public interest requires. Moreover, once the temporary stay is issued, the injured party must resort to the court of appeals and assume the burden of showing that *the public interest requires that the administrative stay be lifted.* This is a "heavy burden" and the Commission receives the benefit of this weight.

However, if the Commission were forced to seek its temporary stay in the courts, an entirely different concept would emerge. The Commission then would have the burden of showing that the public interest *requires* the imposition of

a temporary stay in order to maintain the *status quo!* See, *Bankers Life & Casualty Company v. Holland,* 346 U.S. 379, 98 L. Ed. 106 (1953). Thus, the Commission seeks to avoid proceeding under the All Writs Act, not because the Act provides an inadequate remedy or right, but simply because it would require the Commission to assume the burden of showing, to a court's satisfaction, that interlocutory action is, *in fact,* in the public interest.

The Government also attempts to distinguish the *Dean* case by contending that it is based upon the principle that the FTC has no statutory authority to issue injunctions ". . . because of the absence of any provisions in the Federal Trade Commission Act, similar to Sections 4(i) and 303(r) of the Communications Act . . .". (Pet. 20) This may be an argument relative to the merits of the Ninth Circuit decision, (albeit, an invalid one) but it in no way affects the principle, promulgated by *Dean,* that the Commission has the right to obtain a court injunction under the All Writs Act to maintain the *status quo.* The availability of this remedy clearly and effectively points up the error in Petitioners' contentions that the instant decision deprives the Commission of a means to protect the public interest. The fact is that the FTC has a much more vital need for the power to issue temporary stays than does the Federal Communications Commission. Yet, this Court and Congress have been fully content to have the FTC protect the public interest by resort to the courts. There is nothing in this record, or in the petitions, which demonstrate that the Commission cannot do equally well!

The Government and Midwest also contend that the Ninth Circuit decision is in direct conflict with that of the United States Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc. v. Federal Communications Commission,* No. 20274, decided June 30, 1967. (App. D, pp. 67-80). This contention is made despite the fact that *Buckeye* was issued over two months after the Ninth Circuit decision and no reference was made to that opinion by the District of Columbia Court.

In *Buckeye*, the court was faced with a Commission decision under the cease and desist procedure specifically provided by Section 312 of the Communications Act of 1934, as amended. The subject of the appeal was a final order of the Commission, issued after proper notice and hearing. The court of appeals noted that Buckeye was challenging the ". . . Commission's distant-signal rules and the cease-and-desist order issued under them." (App. D, p. 69) The court then stated, being fully aware of the Ninth Circuit decision, which had been furnished to it by the General Counsel of the Commission, that "(1) *A threshold question of first impression* is whether the FCC has jurisdiction to regulate CATV systems which employ no microwave transmission." (Emphasis supplied) (*Id.* at 70) The court then concluded that the Commission had such jurisdiction without, it bears repeating, making any reference to the Ninth Circuit decision. The obvious reason the Ninth Circuit decision was not mentioned is that the District of Columbia Circuit Court properly recognized that the question of the extent of the Commission's authority to regulate CATV systems, using proper procedures, was one thing, and the question of its authority to temporarily stay the activities of either licensed or unlicensed entities was quite another.

In *Buckeye*, the court found that the Commission's authority to regulate CATV systems, subject to following required procedural conditions, e.g., Section 312(c) of the Communications Act, flows from Sections 1, 2, 303(f) and (h), and 307(b) in addition to Sections 4(i) and 303(r). Perhaps it will ultimately be determined by this Court that those other sections of the Act alone, or in combination with Sections 4(i) and 303(r), do authorize the Commission to regulate CATV systems. In any event, relying on a theory primarily based on Section 307(b) of the Act, the court in *Buckeye* held that some such statutory complex does provide the needed authority. On the other hand, the court below, since it does not mention these other sections, obviously did not consider the question even indirectly. In fact, the decision below specifically pointed out that ques-

tions, such as those decided by *Buckeye*, were raised by Respondents and just as specifically pointed out that the court was not deciding them. The court below also pointed out that grounds of "constitutional dimension" had been raised by Respondents, but in view of the decisive, although narrow, basis for its decision, declined to consider them. For this reason, there simply is no "conflict of circuits" question presented for this Court's consideration in connection with the instant requests for a writ of certiorari.

The difference in the two decisions is clearly pointed up by the Federal Communications Commission's own determination of the meaning of the Ninth Circuit decision, which incidentally was reached before the Commission had decided to seek relief in this Court. Respondents had filed a petition seeking dismissal or postponement of their pending administrative proceeding on the ground that the Ninth Circuit decision also meant that the Commission had no authority to issue a permanent stay. The Commission rejected that request summarily, stating: (Docket No. 16786, FCC 67-584, dated May 23, 1967)

> ". . . Petitioners have misconstrued the Court's decision. In paragraphs 24-26 of our designation order, FCC 66-683, 4 F.C.C.2d 612, released July 25, 1966, we placed temporary restrictions upon the expansion of the CATV systems pending final disposition of this proceeding.[1] The *Ninth Circuit Court's decision vacated and set aside our order only 'to the extent that it limits the operations of the petitioners [the CATV systems] as set forth in paragraphs 24-26 of this order'* (slip op. p. 10). The request for termination of the proceeding must therefore be denied. The alternative request for a stay of the hearing during the pendency of any action for review of the Court's decision would be inconsistent with the public interest which requires the expeditious resolution of the issues designated for hearing, and that request must also be denied." (Footnote omitted) (Emphasis supplied)

The Government tries to ignore this Commission decision by burying it in a footnote on page 15 of its Petition, while Petitioner, Midwest, completely ignores the Commission's decision as well as its own interpretation of the Ninth Circuit decision filed in opposition to Respondents' petition.[6]

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[6]In its Opposition, filed on May 12, 1967, Midwest stated as follows:

> "The petitions rest on the premise that the decision of the Court of Appeals for the Ninth Circuit in *Southwestern Cable Co. v. United States*, decided April 28, 1967, *means that the Commission lacks power to regulate CATV. This issue was deliberately not decided by the court.* The court held only that the Commission lacked authority to order respondents, without an oral hearing of any sort, to limit the expansion of their operations pending conclusion of the Commission proceeding. Having so held, the court expressly stated:
>
> 'We decline to express any opinion as to the other issues raised in this proceeding.' (Slip op. p. 9.)
>
> "Respondents can find no comfort in the court's reliance on their arguments in support of their contention that the Commission lacks any power to regulate CATV. (See brief of Mission Cable TV, Inc., et al., to the Ninth Circuit Court of Appeals, pp. 18-20.) The court relied on these arguments only to support its holding that the Commission lacked the power to issue temporary relief. Whether or not the court would accept respondents' arguments and decide that the Commission entirely lacks the power to regulate CATV is not known, for the court expressly declined to decide that question.
>
> "The question of the power to regulate CATV is presented in two cases in the Court of Appeals for the District of Columbia Circuit, one of which has been fully briefed and argued and awaits decision. *Buckeye Cablevision, Inc. v. FCC*, No. 20,274; *TeleSystems Corp. v. FCC*, No. 20,387. The question is also presented in several appeals from the Commission's *Second Report and Order* which are now pending in the Eighth Circuit Court of Appeals. *Black Hills Video Corp., et al. v. United States*, Nos. 18052, 18348, 18481, 18482, 18793, 18813, 18839.
>
> "In light of the pendency of these cases, in which the power to regulate is squarely presented, it would be wholly improper for the Commission to dismiss this proceeding on

The Government, in its footnote, cannot bring itself to repudiate expressly the Commission's first evaluation of the lower court's action but attempts to straddle the fence by stating that the Commission's decision does not commit it to a "narrow view of that decision" or impair its ability to seek review "of the broad rationale" on which the decision was based. (Pet. 16)

It is submitted that such an ambivalent position is particularly unfortunate when adopted by two agencies of the Federal Government in their relations with American citizens. They, as well as the courts, are charged with the responsibility of dealing fairly and honestly with the public and protecting the rights of citizens. Yet, this Court now is presented with the picture of an administrative agency interpreting an appellate court decision in two diametrically different ways, and, in each instance, the interpretation is in the self-serving interest of the agency and to the detriment of the citizens against whom the agency is proceeding. In addition, it is clear that the public interest would not have been harmed if the Commission had, at least, postponed the administrative hearing pending a decision on the petition for certiorari, since the Ninth Circuit stay on CATV construction remained in effect. It is submitted, therefore, that Petitioners' prior actions must be considered by this Court in passing upon the validity of their present contentions of the need for review of this decision.

It appears that the Commission's action in continuing the adminsitrative proceeding is motivated by a preconceived intention to limit CATV operations in San Diego, irrespective of judicial decisions.[7] The effect on Respondents of the

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the ground that the Ninth Circuit has decided the power question against the Commission, especially when the court expressly said that it was not deciding the question." (Emphasis supplied)

[7]It is significant to note that the Commission's press section made no mention of the Ninth Circuit decision. Yet, when the United States Court of Appeals for the District of Columbia Circuit decision was issued, the Commission issued a long press release indicating its jurisdiction over CATV had been confirmed.

grant of the petition for certiorari, followed by an early administrative decision and the issuance of a permanent stay, is obvious.[8] A decision on the merits by this Court, affirming the court below, will be meaningless so far as Respondents are concerned, since the temporary stay will have been superseded by the permanent stay. Under these circumstances, the Respondents will have to institute new appellate proceedings and start up the long road to this Court, once again, if they are to obtain any relief. It is clear, therefore, that, in light of the Commission's refusal to stay the administrative proceeding, the granting of certiorari in this case, will be the same as a reversal on the merits, so far as Respondents are concerned.

In addition, Petitioners allege that the Ninth Circuit decision is in conflict with two other circuit court decisions, but this contention also is completely without merit. Petitioner, Midwest, refers to the Tenth Circuit decision in *Amerada Petroleum Corp. v. Federal Power Commission,* 293 F.2d 572 (C.C.A. 10th, 1961), *cert. denied,* 368 U.S. 976 (1962), which deals with a specific Congressional delegation of power to the FPC. Section 4(d) of the Natural Gas Act of 1938, as amended, 52 Stat. 822, 15 U.S.C.A. § 717c (1963), provides that unless the FPC orders otherwise, no change can be made in any rate except upon thirty days notice, but the FPC, "for good reason shown" may allow the change to take effect without requiring the thirty-day notice. Section 4(e), gives the FPC *the specific power to suspend the operation* of the new tariffs pending hearing upon the lawfulness of such new charges. In proceedings under these two sections, the FPC had established a policy that, during the suspension of a new rate, the prior existing rate schedule continued in effect and could not be changed. Thus, the FPC's order

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[8]The Broadcast Bureau, in its proposed findings, has recommended that CATV in San Diego be prohibited from carrying all independent Los Angeles stations as well as originating programs. This Bureau pleading also was the subject of a Commission press release, while Respondents' Proposed Findings were never recognized.

was the logical application of power *specifically* given by Congress.[9] Section 16 of the Natural Gas Act, the general powers section, was cited incidently in support of this application of the specific authorization. In contrast, the Federal Communications Commission has no specific grant of power to issue a temporary stay except for the limited purpose expressly provided for in Section 204. Thus, the Commission's entire reliance on the general powers given by Sections 4(i) and 303(r) cannot be equated to or justified by the court's approval of the action of the FPC.

Both Petitioners rely on the decision of the United States Court of Appeals for the District of Columbia Circuit in *R. A. Holman Co., Inc. v. Securities and Exchange Commission*, 112 U.S. App. D.C. 43, 299 F.2d 127 (1962), *cert. denied*, 370 U.S. 911 (1962), which upheld the power of the SEC to suspend, without hearing, a broker's right to deal in exempt securities under the agency's general regulatory power. Petitioners ignore the controlling fact which is that the court in *Holman* did not have before it the issue of whether Congress had given the SEC the power to order such a suspension. Both the appellant and the Government in that case assumed that Congress had given the SEC the required power, and the sole issue was whether the grant of such a power was valid. The issue before the Ninth Circuit was entirely different. It was simply whether or not Congress had *given the Commission the power to grant a temporary stay*, not, as in *Holman*, whether the grant of such power was valid. Thus, there is clearly no conflict between the instant decision and the District of Columbia Circuit Court's opinion in *Holman*.

Respondents concede that the Commission's assertion of jurisdiction over CATV systems present problems of far-reaching importance involving not only basic questions of statutory authority but also questions of significant "con-

[9] This is precisely what the Federal Communications Commission is authorized to do under the provisions of Section 204 of the Communications Act.

stitutional dimension", the latter having to do with the First and Fifth Amendments to the Constitution of the United States. The decision of the Ninth Circuit, however, is not the proper vehicle for presenting those questions to this Court because the decision of the court below is much too narrow.

However, there are five cases now pending in the United States Court of Appeals for the Eighth Circuit which will provide a proper vehicle for presenting these very important questions to this Court. The Eighth Circuit petitioners include Respondents here (Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp.), Buckeye Cablevision, Inc., Black Hills Video Corporation, Midwest Video Corporation and Alice Cable Television Corporation.[10] In addition, the intervenors in the Eighth Circuit consolidated proceeding include the National Association of Broadcasters and the National Community Television Antenna Association. The questions posed *directly* before the Eighth Circuit include the same jurisdictional question on which Petitioners want a ruling by this Court. In addition, the constitutional question, also raised but not considered or ruled on by the court below, is fully briefed before the Eighth Circuit. Briefs for the petitioners have been filed and the cases are scheduled for argument in October, 1967.

In reaching a decision, the Eighth Circuit must pass on whether the Federal Communications Commission lacks statutory authority to regulate CATV systems (but not on whether it lacks statutory authority to issue temporary stays either against licensees or non-licensees). If it decides this issue affirmatively, the court must then determine whether the regulation of CATV systems, in the manner contemplated by the Commission's rules, violates the First and Fifth Amendments to the Constitution of the United States. If either issue is decided adversely to the Commission, the Government will have a bona-fide conflict. On the other

[10]The case numbers are as follows: 18839, 18813, 18052, 18348 and 18793.

hand, if the Eighth Circuit should decide in favor of the Government, it is a foregone conclusion that one or all of the Eighth Circuit petitioners will request this Court to review the decision. Under these circumstances, Respondents submit that Petitioners, by filing for review of the narrow holding of the Ninth Circuit, are not only requesting this Court to prematurely judge an extremely complex legal question, not properly before it, but also are seeking to subject this Court to a multiplicity of litigation.

In this connection, it is the stated position of Petitioners that the question they want this Court to decide is ". . . whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna (CATV) systems." (Pet. 2) Their concern about the Commission's authority to issue temporary stay orders is obviously secondary and is advanced only to give this Court a "handle" with which to get at the question of primary interest to them.

Moreover, in Respondents' opinion, it is extremely doubtful, in view of Rule 23(c), whether this Court can properly reach all of the fundamental questions that must be considered before the Commission's authority with respect to CATV systems can be determined. Among others, the very important constitutional issues cannot be said to be "fairly comprised" within the questions presented by Petitioners, since they are not even alluded to in Petitioners' arguments in support of the Commission authority.

On the other hand, all questions of importance, including those considered by the United States Court of Appeals for the District of Columbia Circuit in *Buckeye*, are squarely presented in the Eighth Circuit cases and will unquestionably be just as squarely presented to this Court for review following a decision in that circuit.

CONCLUSION

It is well recognized, and Respondents agree, that the question of federal regulation of CATV in particular, and transmission by wire of program material and information in general, and the nature and scope of such regulation, will not be finally determined short of a decision by this Court. To be meaningful, however, the decision must encompass all of the many subsidiary questions involved and should be arrived at only after all of the many interested parties have had an opportunity to express their views in the forums in which they are entitled to appear. Such a decision, it is respectfully submitted, will not be forthcoming if based on the limited review improperly requested, but obviously desired, by Petitioners. The decision below, which Respondents believe to be correct, is not of general significance to administrative law and involves no conflict of circuits. Moreover, it does not deprive the Commission of any needed remedy to protect the public interest. It is respectfully submitted, therefore, that the petitions for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Communications Act of 1934, 48 Stat. 10674, as amended, 47 U.S.C. § 151 *et seq.* (1964):

SEC. 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 312

* * *

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated

in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.